Supreme Court, U.S.
FILED
JAN 29 1999

No. 98-985

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LINCOLN HERBERT,

Petitioner,

vs.

ROBERT J. REINSTEIN, DEAN, TEMPLE UNIVERSITY SCHOOL OF LAW AND VICE PRESIDENT OF TEMPLE UNIVERSITY, TEMPLE UNIVERSITY SCHOOL OF LAW AND TEMPLE UNIVERSITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. The Petition Misrepresents The Procedural History Of This Case.

The Petition seeks this Court's review of the Third Circuit's unpublished opinion affirming the district court's dismissal of Petitioner's amended complaint, in which he alleged that Respondents, Temple University, Temple School of Law, and Dean Robert J. Reinstein, violated his civil rights and breached a contract with him.

Despite Petitioner's passing reference (Petition at 5 n.1), the instant case represents Petitioner's second lawsuit against Respondents arising from the same factual background. In his first lawsuit, filed September 20, 1994 in the United States District Court for the Eastern District of Pennsylvania, Case No. 94-5765, Petitioner filed a *pro se* complaint and a motion for a temporary restraining order. Petitioner sought to compel Respondents to reinstate him as a law student at Temple School of Law pending the outcome of an internal disciplinary proceeding against him after his temporary suspension by Dean Reinstein in May of 1994 for engaging in violent and deceitful conduct. Petitioner brought claims under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983, alleging a denial of due process, free speech, and free association rights.

In the first action, District Court Judge Clarence A. Newcomer denied Petitioner's request for a temporary restraining order and consolidated his request for a preliminary injunction with a trial on the merits. The Disciplinary Committee of the Law School held its internal hearing in October, 1994 and found Petitioner violated the Code of Student Conduct and ordered him suspended for over two years. At the

At the trial on the merits in the district court, Petitioner, then represented by counsel, requested and was granted leave to challenge not only the constitutionality of his May, 1994 temporary suspension by the Dean but also the suspension decision of the Disciplinary Committee. After a full evidentiary hearing, the district court entered judgment in favor of Respondents.

The district court found that Dean Reinstein was fully justified in suspending Petitioner temporarily, pending a formal disciplinary investigation, because it was reasonable for the Dean to conclude that Petitioner posed a "clear and present danger" under *Goss v. Lopez*, 419 U.S. 565 (1975). App. A to Respondents' Brief in Opposition (hereinafter "Opposition") at 9a. The district court also found that the later decision of the Disciplinary Committee was constitutionally valid and "that Mr. Herbert received all process that he was due at the formal hearing before the student panel." App. A to Opposition at 10a.

Petitioner appealed the district court's decision on both issues to the Court of Appeals for the Third Circuit. A majority of the Third Circuit affirmed the denial of injunctive relief but found, *sua sponte*, that Dean Reinstein should have informed Petitioner that his prior incidents of violent behavior had influenced the Dean's decision in May, 1994 to suspend Petitioner temporarily. App. B to Opposition at 26a-27a.[1]

The Court of Appeals unanimously affirmed the district court's finding that the Disciplinary Committee's decision was

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1. Circuit Judge Stapleton dissented finding that the scope of notice decided by the majority was not required under *Goss* and failed to strike a reasonable balance between the needs of law student Herbert and the security needs of the Law School community. App. B to Opposition at 33a-34a.

constitutionally valid and that Petitioner was provided with all the process he was due: "However, we conclude that the proceedings before the Disciplinary Committee were constitutionally adequate and thus, as Herbert was suspended by the Committee, he is not entitled to injunctive relief." App. B to Opposition at 28a. The Third Circuit also found that Petitioner's failure to raise his First Amendment claim on appeal was fatal to that claim. App. B to Opposition at 29a-30a.

On remand from the Court of Appeals, the district court held a damage hearing and awarded Petitioner $1.00 in nominal damages. App. C to Opposition at 45a-46a.

Petitioner appealed the district court's damage award, but his appeal was dismissed by the Clerk of Court on May 30, 1997 for failure to file a brief in accordance with Rule of Appellate Procedure 28(g). App. D to Opposition at 47a. Petitioner's motion to set aside the Clerk's Order dismissing his appeal was denied by the Third Circuit, as was his motion for reconsideration. App. E and F to Opposition at 48a-51a.

On January 21, 1997, while his appeal to the Third Circuit from the district court's damage award was still pending, Petitioner, then represented by new counsel, filed a second action in the district court.[2] In this new action, Petitioner again challenged the decision of the Disciplinary Committee, which the district court and Third Circuit had already found was constitutionally valid.

Respondents filed a motion for sanctions on the basis that Petitioner was pursuing claims that were time-barred, had been

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2. Counsel did not mark the second filed case related to the first case before Judge Newcomer. Upon notification by Respondents, the Chief Judge reassigned the second case to Judge Newcomer. App. G to Opposition at 52a.

litigated previously, and were legally and factually baseless.[3] Alternatively, Respondents sought dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing, *inter alia*, that Petitioner's claims were time-barred by the applicable two-year statute of limitations and that the civil rights claims were barred by the doctrines of *res judicata* and/or collateral estoppel.

The district court denied Respondents' motion for sanctions but granted their motion to dismiss all counts of Petitioner's amended complaint, ruling that all of Petitioner's civil rights claims were barred by the statute of limitations. The district court also held that Petitioner's due process claims concerning his suspension and the disciplinary proceedings, his contract claim based upon a breach of a covenant of good faith and dealing, and his First Amendment claim were barred by collateral estoppel and/or *res judicata*. The district court held that Petitioner's contract claim failed to allege any specific facts to support a breach of good faith and dealing and that Petitioner's claim under the Fourteenth Amendment and 20 U.S.C. § 1232(h), relating to the imposition of a psychiatric examination as a condition of his readmission to the Law School, was time-barred and otherwise not actionable as a matter of law. App. B to Petition at 18a, 25a-29a.

On appeal, the Third Circuit unanimously affirmed the district court's decision, holding that the applicable statute of limitations barred all of Petitioner's civil rights claims and that

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3. In addition to Respondents, Petitioner also sued numerous other individuals associated with Temple University and the Temple Law School, including the attorneys who had defended Respondents in the first action. When counsel for the defendants filed a motion for sanctions pursuant to Federal Rule of Civil Procedure 11, Petitioner's counsel filed an amended complaint dropping all defendants except Respondents, Temple University, Temple Law School and Dean Reinstein. App. B to Petition at 13a.

the doctrine of *res judicata* barred Petitioner's breach of contract claim. The Court declined to address the issues of collateral estoppel and *res judicata* as applied to Petitioner's civil rights claims. App. A to Petition at 7a.

On September 17, 1998, the Third Circuit denied Petitioner's petition for rehearing *in banc*. App. C to Petition at 32a.

REASONS FOR DENYING THE WRIT

I.

THE THIRD CIRCUIT CORRECTLY APPLIED *RICKS* AND *CHARDON* TO THE FACTS OF THIS CASE.

The Third Circuit correctly decided that Petitioner's civil rights claims were time-barred pursuant to *Delaware State College v. Ricks*, 449 U.S. 250 (1980) and *Chardon v. Fernandez*, 454 U.S. 6 (1981). The Third Circuit held that the applicable two-year statute of limitations commenced on October 17, 1994, the date when the Disciplinary Committee of the Law School issued its final decision suspending Petitioner:

> Courts consistently have rejected the argument that Herbert advances in this appeal; namely, that pursuit of some internal appeal should toll the statute of limitations. *See, e.g., Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980) (holding that initiation of grievance procedure did not toll accrual date on claim); *Soignier [v. American Brd. of Plastic Surgery*, 92 F.3d 547, 553 (7th Cir. 1996)] (holding that employee's pursuit of internal grievance procedure does not affect accrual date); *Morse v.*

> *University of Vermont*, 973 F.2d 122 (2d Cir. 1992) ("an internal administrative review of [an] allegedly discriminatory decision has no effect on when the statute of limitations period begins to run") . . . Accordingly, we conclude that Herbert's claims arising in Counts 1, 2 and 4 of his amended complaint accrued on October 17, 1994 — the date the disciplinary committee meted out its sanctions and thus the date that Herbert was aware of should have been aware of his alleged injuries. Thus, the district court properly applied the appropriate limitations period with respect to Counts 1, 2 and 4.

App. A. to Petition at 6a-7a.

Petitioner challenges that holding by arguing that the Disciplinary Committee's decision was not "final" claiming that the decision was automatically reviewable by the Plenary Faculty. Petitioner's assertion is incorrect for two reasons. First, the Disciplinary Committee's decision as to the sanctions imposed under the Code of Student Conduct was final unless Petitioner filed an internal appeal of that finding to the Faculty Review Panel and again to the Plenary Faculty. Therefore, if Petitioner had not filed an internal appeal, the Disciplinary Committee's decision on sanctions would have been final without any further action. *See* App. E to Petition at 41a ("A matter shall be considered final after the Committee has made its determination and the time for seeking review has passed without the filing of a Petition for Review, or, if a Petition for Review was filed, after completion of the review process.").

Second, contrary to Petitioner's implication, the Plenary Faculty was without authority under the Code of Student Conduct to review the Disciplinary Committee's decision on

the merits as to the issue of guilt or innocence. It was only authorized to review the sanctions imposed. *See* App. E to Petition at 46a-47a ("The Plenary Faculty may decrease the sanction only if the decrease is approved by a three-fifths (3/5) vote of the Faculty members present.").

Therefore, the subsequent review process outlined in the Law School's Code of Student Conduct is precisely the type of internal appeal or grievance procedure which this Court held in *Ricks* did not affect the commencement of the statute of limitations: "The grievance procedure, by its nature, is a remedy, for a prior decision, not an opportunity to influence that decision before it is made." 449 U.S. at 261.

Petitioner clearly understood this Court's ruling in *Ricks* because he challenged the decision of the Disciplinary Committee in the first action and then unsuccessfully appealed that issue to the Third Circuit. Indeed, if the Disciplinary Committee's decision was not final and had no legal effect until further action was taken, as Petitioner's new counsel now argues, then why did Petitioner's prior counsel challenge that same decision in the first action? In the first action, the district court found, and the Third Circuit affirmed, that Petitioner obtained all the process he was due through and including the October, 1994 Disciplinary Committee's decision on his suspension. App. B to Petition at 12a-13a.[4]

Accordingly, this case hardly supports Petitioner's argument that there has been uncertainty created as to when to file a civil rights action in the wake of this Court's decision in

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4. Therefore, the district court properly found in the second action under the doctrine of *res judicata*, and the Third Circuit did not disturb, that all but one of the claims raised in the second action challenging the Disciplinary Committee's decision, and the related sanctions, were or could have been raised in the first action. App. B to Petition at 20a-25a.

Ricks. Petition at 11. The facts of this case show that the Third Circuit correctly applied this Court's clear decision in *Ricks*.

II.

THERE IS NO SPLIT IN THE CIRCUIT COURTS OF APPEAL AS TO THE ACCRUAL DATE OF A CIVIL RIGHTS CLAIM IN AN EMPLOYMENT OR TENURE CASE UNDER *RICKS* AND *CHARDON*.

Contrary to the Petition's assertion, all Circuit Courts of Appeal have held, consistent with *Ricks* and *Chardon*, that a civil rights action accrues in an employment context when the employer's alleged discriminatory decision is made and the plaintiff is notified of the decision. Any internal grievance procedure to review the discriminatory decision does not delay the start of the limitations.

The Petition asserts that in applying this Court's decision in *Ricks*, some Circuits' focus upon the finality of a decision is inconsistent with other Circuits' focus on notice of the decision to the plaintiff. However, under *Ricks* and *Chardon*, these concepts are not mutually exclusive. Both a final, non-tentative decision *and* notice to the plaintiff are required to trigger the statute of limitations. *Ricks*, 449 U.S. at 259; *Chardon*, 454 U.S. at 12. That some cases cited by Petitioner focus on the date of the employer's decision while other cases focus on the date when the plaintiff was notified of that decision does not render those cases inconsistent or incompatible.

For example, in *Harris v. Ladner*, 127 F.3d 1121 (D.C. Cir. 1997), a case cited by Petitioner, the Court of Appeals for the District of Columbia Circuit was confronted with the issue of which decision among multiple administrative levels in a tenure application process was the non-tentative decision which

triggered the statute of limitations. The Court held that where a university had both a reconsideration process and a grievance process to review tenure decisions, which processes were separate and distinct from each other, it was reasonable for the plaintiff to believe that the reconsideration process was a continuation of the original application for tenure process and that the initial departmental committee decision to deny her tenure application was merely tentative. 127 F.3d at 1124-1125.

In deciding that plaintiff's claim accrued when she received the notification from the Dean of the College, the Circuit Court in *Harris* distinguished *Ricks* by correctly noting that the university's reconsideration process there may not have been a grievance or some other method of collateral review but rather may have been a continuation of the original application process. *Id.* at 1124-1125. The Court of Appeals held, citing *Ricks*, that the grievance procedure there, unlike here, came into play only after the final decision was made as part of the reconsideration process. *Id.* at 1125.

The decision of the Ninth Circuit cited by Petitioner is likewise consistent with *Ricks* and not at odds with decisions of other Circuit Courts of Appeal. *McCoy v. San Francisco*, 14 F.3d 28 (9th Cir. 1994), merely involved the question of whether a plaintiff's claim accrued on the date that an oral disciplinary decision was issued by a police commission or the date when the written decision was subsequently issued. That case did not involve multiple layers of review or appeal nor did the case involve the exhaustion of administrative remedies. The Court of Appeals noted that it was not until the written decision was issued that the plaintiff's defenses were rejected. *Id.* at 30.[5]

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5. Indeed, the Ninth Circuit rejected the "finality" argument of the plaintiff in *Fobbs v. Holy Cross Health System Corp.*, 29 F.3d 1439 (9th

(Cont'd)

Similarly, the Seventh Circuit's cited decision in *Lever v. Northwestern University*, 979 F.2d 552 (7th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993), lends no support to Petitioner's argument. The issue in *Lever* was whether it was the recommendation of the Dean of the College not to promote plaintiff and grant her tenure or the Provost's decision to accept the Dean's recommendation which triggered the statute of limitations. The Court of Appeals held that the Dean's recommendation was really a decision, as evidenced by his offer to plaintiff of a one year terminal contract. *Id.* at 554. The Seventh Circuit noted that the Dean's decision was self-effectuating, notwithstanding that the recommendation was subject to review by the Provost. As such, the Seventh Circuit's decision did not impose a requirement of finality, since it was the Dean's initial recommendation, rather than the Provost's final decision, which triggered the statute of limitations. *Id.* at 556.

Significantly, unlike many of the cases cited in the Petition where the plaintiff was totally barred from bringing a case, Petitioner here was not prevented from fully litigating his claims. On the contrary, Petitioner challenged the Disciplinary

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(Cont'd)
Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995), in which the plaintiff, a physician, filed suit alleging, *inter alia*, that the suspension of certain of his operating privileges at the defendant hospital violated his rights under 42 U.S.C. § 1981. The Ninth Circuit affirmed the dismissal of the plaintiff's claim, holding that the statute of limitations was triggered by the summary suspension of the plaintiff's privileges by the Medical Executive Committee of the hospital and not by the subsequent notification formalizing the suspension and denying the plaintiff's request for fair hearing conditions. Thus, there was no requirement of "finality" imposed and the Ninth Circuit's decisions in *McCoy* and *Fobbs* interpreting *Ricks* are consistent with those of the other Circuit Courts of Appeal. Petitioner's assertions to the contrary are simply incorrect.

Committee's final decision, albeit unsuccessfully, in the original district court proceedings and before the Third Circuit. App. A and B to Opposition at 10a and 28a.

The cases cited by Petitioner from the Second and Sixth Circuits are also entirely consistent with this Court's decision in *Ricks*. In *Morse v. University of Vermont*, 973 F.2d 122 (2d Cir. 1992), the Second Circuit noted that in determining the accrual date in a discrimination claim, the timeliness of the claim "is measured from the date the claimant receives notice of the allegedly discriminatory decision." *Id.* at 125 (quoting *O'Malley v. GTE Serv. Corp.*, 758 F.2d 818, 820 (2d Cir. 1985)). In that case, the discriminatory decision was the decision to terminate the plaintiff as a candidate for a Master's degree. Consistent with *Ricks*, the fact that the University undertook an internal review of the matter and allowed the plaintiff to continue to take courses at the University had no effect on the accrual date of her cause of action. There is nothing in that Court's opinion to support Petitioner's argument that the Second Circuit's focus on the date when plaintiff was notified of the adverse decision is at odds with decisions of the Seventh, Ninth, or District of Columbia Circuits. Rather, the Second Circuit was merely giving the plaintiff the benefit of the last possible date when her cause of action accrued, which was the date when she was notified of the discriminatory decision rather than the date of the decision itself.[6] Since the University informed plaintiff of its decision in a letter, the operative date would have been the date of the letter, rather than the date of the decision.

Similarly, the Sixth Circuit's cited decision in *Blackwell, Inc. d/b/a Kuka's Place v. Fisher*, 1993 U.S. App. LEXIS 29295

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6. Petitioner here challenged the sanctions imposed by the original decision of the Disciplinary Committee, which he then appealed internally, and not the internal appeal process itself.

(6th Cir. 1993), merely stands for the well-settled proposition that a plaintiff's cause of action accrues when he knows or has reason to know of the injury which is the basis of the action. Quoting *Ricks*, the Sixth Circuit noted, as did the district court and Third Circuit here (App. B to Petition at 18a and App. A to Petition at 6a), that the proper focus is upon the time of the allegedly illegal act and not upon the time at which the consequences became painful. *Id.* at *5. Therefore, the Sixth Circuit's decision in *Fisher*, like all the other Circuit Court decisions cited by Petitioner, is entirely consistent with *Ricks*.[7]

III.

PETITIONER'S CLAIM CONCERNING HIS PSYCHIATRIC EXAMINATION IS TIME-BARRED AND IS CONSTITUTIONALLY UNSUPPORTED.

Petitioner's challenge to the imposition of psychiatric counselling is time-barred, as the district court and Third Circuit found, for the reasons set forth above. This sanction was imposed by the Disciplinary Committee on October 17, 1994 and immediately injected into the record of the then district court proceedings by Petitioner for purposes of judicial review. App. A to Opposition at 4a-5a, 10a. The sanction was later

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7. Finally, the cited case of *Dunleavy v. Local 1617, United Steelworkers of America*, 814 F.2d 1087 (6th Cir. 1987), involved a claim under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411, *et seq.* The Sixth Circuit specifically held that this Court's decision in *Ricks* was inapposite because of the unique policy behind the Labor Management Reporting and Disclosure Act in favor of resolving internal labor disputes. *Id.* at 1091. Thus, the Sixth Circuit held that the statute of limitations was tolled while the plaintiff pursued his internal union remedies which he was required by the union constitution to exhaust. Accordingly, the analysis of the Sixth Circuit in *Dunleavy* is simply inapplicable to a civil rights claim and lends no support to Petitioner's argument.

modified by the intermediate Faculty Review Committee by replacing the 100 hours of psychological counseling with a single psychiatric examination. The Plenary Faculty decision of January 18, 1995, left the decision of the Faculty Review Committee with regard to the psychiatric examination intact.[8] In light of the fact that Petitioner's present counsel did not institute suit until January 21, 1997, more than two years after the Disciplinary Committee issued its decision on October 17, 1994, his claim concerning the imposition of a psychiatric examination was also found by the district court and the Third Circuit to be barred by the applicable two-year statute of limitations. App. B to Petition at 18a and App. A to Petition at 6a-7a.[9]

In addition, Petitioner had a full and fair opportunity to raise this issue in his first lawsuit. The district court on remand in the first action conducted an extensive damages hearing on February 23, 1996, at which time Petitioner had ample opportunity to and did present evidence of the alleged stigma and damage to his reputation suffered as a result of the Disciplinary Committee's sanctions, which included the requirement that Petitioner seek psychological counseling. As the district court held:

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8. This is not a case where the sanctions imposed were increased during the internal appeal process. Here, the sanctions imposed by the Disciplinary Committee of 100 hours of community service and 100 hours of psychological counseling were modified through the internal appeal process to require only a favorable psychiatric evaluation by a psychiatrist of Petitioner's choice prior to his readmission to the Law School.

9. In his Petition for Writ of Certiorari, Petitioner improperly refers to and includes in his Appendix the results of a polygraph examination. Said results were not a part of the record before the district court, nor were they presented to the Law School Disciplinary Committee. *See* Rule 10(a) of the Rules of Appellate Procedure.

> Herbert himself is responsible for any damage caused to his reputation. Herbert presented no evidence showing that Dean Reinstein notified any person about the circumstances of the suspension. Rather, Herbert embarked on a campaign to publicize the suspension and the reasons underlying the suspension.

App. C to Opposition at 44a.

Nevertheless, Petitioner argues that it was unconstitutional for him to undergo a psychiatric examination as a condition of his readmission to the Law School. He relies upon *Addington v. Texas*, 441 U.S. 418 (1979) to support his position. However, *Addington* only dealt with the proper burden of proof for a civil commitment to a state psychiatric hospital. In the present case, Petitioner was never compelled to undergo psychiatric treatment nor was he civilly committed to a state mental hospital. He was only required to undergo a psychiatric examination as a condition of his readmission to the Law School because Petitioner had previously engaged in a number of confrontations in which he demonstrated increasingly violent behavior. This conduct culminated in the incident of May 3, 1994, in which Petitioner sprayed an unarmed individual with dangerous pepper gas inside the Law School building, during final exams. Moreover, Petitioner did obtain a favorable evaluation from a psychiatrist of his own choosing, resulting in his readmission to the Law School in January, 1997, from which he successfully graduated in May, 1997.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 20, 1994 AND FILED OCTOBER 21, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 94-5765

LINCOLN HERBERT

V.

ROBERT REINSTEIN
TEMPLE UNIVERSITY SCHOOL OF LAW
TEMPLE UNIVERSITY

Newcomer, J. October 20 , 1994.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a full and final hearing on plaintiffs' request for permanent injunctive relief held on October 13 and 18, 1994,[1] and after consideration of the testimony of the witnesses, the admitted exhibits, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law.

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1. Plaintiffs originally came before this Court with a motion for a preliminary injunction. Upon Order of this Court, the hearing was considered a final hearing, not a hearing for preliminary injunctive relief.

Appendix A

FINDINGS OF FACT

1. Plaintiff Lincoln Herbert has been a student at Temple University School of Law since August 1991. Mr. Herbert was a full-time student during his first two years. Mr. Herbert attended part-time during his third year and planned to continue part-time for a fourth year. Mr. Herbert intended to graduate from the law school in May 1995.

While a student at Temple, Mr. Herbert founded and acted as president of the Western Heritage Society, a politically "right-wing" student organization. The Western Heritage Society's viewpoints were unpopular among many students, faculty and administrators at Temple University and the law school.

2. Mr. Herbert received a letter from the Dean of the Law School, Robert Reinstein, at 11:00 a.m. on May 5, 1994. The letter stated that the Dean had received reports of an act of violence involving Mr. Herbert's use of a weapon, pepper gas, inside the law school. As a result of the incident, one asthmatic Temple University employee suffered injuries requiring brief hospitalization. The letter further stated that the Dean was investigating the incident and was considering suspending Mr. Herbert. Mr. Herbert was given the opportunity to meet with, and did in fact meet with, Dean Reinstein that afternoon to present his side of the story.

3. During the meeting, Mr. Herbert claimed that he had inadvertently sprayed the employee while attempting to ward off an attack by a homeless person brandishing a knife. He claimed that his use of the pepper gas inside the law school was limited to that necessary for self defense.

4. The Dean continued to investigate the matter. Police reports and reports made by witnesses to the incident contradicted Mr. Herbert's account of the incident. These reports stated that the homeless person did not have a knife and that Mr. Herbert was not under attack in the law school. Moreover, additional evidence showed that a law school security guard was in close proximity to Mr. Herbert when Mr. Herbert sprayed the pepper gas.

5. The Dean was aware of several other incidents that had occurred during Mr. Herbert's tenure at the law school. The incidents included an altercation between Mr. Herbert and the owner of a food truck parked daily outside the law school; an episode in which Mr. Herbert allegedly acted aggressively toward the eleven year old daughter of a Temple University student; complaints of extreme hostility and rudeness by Mr. Herbert to various Law School staff and employees, including Assistant Dean Adelaide Ferguson; complaints about Mr. Herbert's behavior made by the supervisor and employees of the Temple University Copy Centers; and an incident of violence involving Mr. Herbert and the police at a Chinese restaurant located near the University.

6. On the afternoon of May 5, 1994, the Dean suspended Mr. Herbert. The stated reason for the suspension was that Mr. Herbert was found to present a clear and present danger to the law school community. At trial, Mr. Herbert alleged that the stated reason was merely a pretext. He alleged that the Dean suspended him because the Dean disagreed with his political philosophy and that of the Western Heritage Society.

7. Mr. Herbert was suspended from classes and was not permitted to be physically present on the Temple University

campus until after his case had been resolved through the school's student disciplinary system. Although Mr. Herbert was suspended on May 5, 1994, he was permitted to complete the semester by taking his final examinations at home. Mr. Herbert passed his final examinations. As such, Mr. Herbert's suspension from academic classes did not actually begin until the fall semester, 1994.

8. The Dean referred the case to the Law School's disciplinary counsel. Mr. Herbert was charged with violating the law school code of student conduct by: (1) engaging in acts of violence; and (2) telling falsehoods to a University administrator. As required by the code of conduct, the disciplinary counsel scheduled a hearing before a student committee. The hearing was scheduled for June 21, 1994.

9. Mr. Herbert, through his counsel, requested and was granted three continuances of the hearing. The hearing was finally held on October 3, 1994. The delay in holding the hearing was primarily due to Mr. Herbert's requests for continuance.

10. At the hearing, Mr. Herbert was represented by two attorneys who had the opportunity to object to the introduction of evidence and/or to the hearing officer's instructions to the hearing panel. After reviewing all the evidence, the panel found Mr. Herbert not guilty of engaging in acts of violence and guilty of telling falsehoods to the Dean.

11. Mr. Herbert claims that the October 3, 1994 hearing violated his due process rights because the instructions given to the student panel before their deliberations were unclear.

12. The disciplinary hearing committee met on two more occasions in order to impose sanctions on Mr. Herbert. On

Appendix A

October 17, 1994, the disciplinary committee voted to suspend Mr. Herbert from the law school until January 1997, at which time he could return as a student on a probationary basis. The committee also voted to require that Mr. Herbert undergo one hundred hours of psychological therapy and perform one hundred hours of community service.

CONCLUSIONS OF LAW

1. Courts must show great respect to decisions by University faculty regarding their professional judgments. *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985).

2. A claim of deprivation of Fourteenth Amendment procedural due process rights leads to a two-step inquiry: 1) whether there has been a deprivation of "life, liberty or property" through state action; and 2) if there has been such a deprivation, whether the plaintiff received all the process which he is due under the Fourteenth Amendment. *Morrisey v. Brewer*, 408 U.S. 471, 481 (1975).[2]

3. Once a state undertakes to provide educational services, students attending the school acquire a constitutionally

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2. This Court will address only the due process issues. Although Mr. Herbert alleged at trial that defendants' actions also violated his First Amendment rights of free speech and free association, he failed to sufficiently plead these claims in his Complaint. Consequently, this Court considered Mr. Herbert's evidence regarding selective enforcement of various University rules with regard to the Western Heritage Society, but only for the limited purpose of establishing bias by defendants as the reason for Mr. Herbert's suspension. After reviewing all the evidence, this Court concludes that Mr. Herbert failed to establish that bias by defendants was the real reason for his suspension.

protected property interest in obtaining an education. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). In this case, Temple University School of Law is a state-supported institution. Consequently, Mr. Herbert has a constitutionally protected property interest in continuing his legal education there.

4. Given that Mr. Herbert has a constitutionally protected property interest, the next question is what process was due when he was deprived of that right. The standard differs, depending on whether the suspension was for more or less than ten days. *Goss*, 419 U.S. at 581.

In this case, it is unclear how the Court should characterize the duration of the suspension. Mr. Herbert was suspended from classes and banned from the Temple University campus on May 5, 1994. However, classes had already ended for the semester and Mr. Herbert was not registered for summer classes. Moreover, he was permitted to take his remaining final examinations at home. The hearing was scheduled for June 1994, during the summer term, but was continued until the fall-semester at *Mr. Herbert's* request.

On the other hand, Mr. Herbert was banned from the Temple University campus until his hearing. Therefore, while Mr. Herbert was not deprived of the right to attend classes, he was precluded from engaging in extracurricular activities and from using the school's career planning office during the summer.

In either case, the characterization of Mr. Herbert's suspension is not dispositive; thus, this Court need not address the question of whether Mr. Herbert's suspension exceeded ten days. As the following conclusions demonstrate, this Court finds

that Mr. Herbert received all process that he was due under either standard.

5. For suspensions of ten days or less, a student must be provided with oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have, and an opportunity to provide his side of the story. *Goss v. Lopez*, 419 U.S. 565, 581. *See also Jarmon v. Batory*, 1994 WL 313063 (E.D. Pa.) (Hutton, J.). Such an informal hearing

> will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel.

Goss, 419 U.S. at 583-84.

In this case, Mr. Herbert's informal hearing met the requirements of *Goss*. Mr. Herbert was informed that he was accused of violent acts and of presenting a danger to the Temple University community. Mr. Herbert was also told of the reports made by police and witnesses to the incident. Finally, Mr. Herbert was given the opportunity to tell his side of the story. Dean Reinstein then decided to refer the case to the disciplinary counsel. Since Mr. Herbert's story differed from that of several witnesses, the ultimate determination was a credibility evaluation. The Dean was entitled to make that evaluation. It is not the role of the federal courts to set aside decisions of

school administrators, even if the court may view them as lacking a basis in wisdom or compassion. *Zeller v. Donegal School Dist. Bd. of Ed.*, 517 F.2d 600, 606 (3d Cir. 1975) (en banc).

6. Any suspension for a period of longer than ten days is deemed an expulsion and "may require more formal procedures" than the notice and hearing requirement articulated in *Goss*. *Goss*, 419 U.S. at 584; *Jarmon*, 1994 WL 313063 at *6. In the case of a suspension for more than ten days, this Court must determine whether a violation of due process has occurred. In making this determination, the Court must balance the private interest affected by the official action; the risk of an erroneous deprivation of that interest; and the public interest weighed against the fiscal and administrative burden of any additional procedural requirements. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1979), quoted in *Jarmon*, 1994 WL 313063 at *6.

In this case, Mr. Herbert's interest in obtaining an education is clearly significant. However, any harm suffered by Mr. Herbert in the case at bar was to some extent mitigated by the fact that Mr. Herbert was permitted to take his final exams at home. *See, e.g. Jarmon*, 1994 WL 313063 at *9 (potential harm was mitigated by school's provision of homework assignments to student excluded from school). In fact, Mr. Herbert received the highest grade point average of his law school career during the spring 1994 semester.

Moreover, but for the continuances granted at Mr. Herbert's request, the hearing would have taken place before the commencement of the fall semester. That way, if Mr. Herbert had been exonerated at the hearing, he would not have missed any academic classes.

Finally, this Court must balance against Mr. Herbert's interest the substantial interest of Temple University and the Law School in preserving a safe environment for students and employees. Upon such a balancing, this Court finds that Mr. Herbert received the process due to him.

7. In certain situations, a prior notice and hearing cannot be insisted upon. Students who pose a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. *Jarmon*, at *9, quoting *Goss*, 419 U.S. at 582.

This Court finds that the Dean's conclusion that Mr. Herbert was a clear and present danger was not unreasonable and was supported by evidence, including interviews with the police, university officials, and witnesses to the pepper gas incident. Other evidence included the audiotape of a telephone call made by Mr. Herbert to the security guard on duty that night. Moreover, the police reports of the incident reviewed by the Dean also support his conclusion. Finally, by May 1994, the Dean was aware of various other incidents highlighting Mr. Herbert's propensity for aggression that had occurred at or near the Law School during the 1993-1994 academic year. Consequently, this Court will not second-guess the Dean's determination that Mr. Herbert posed a clear and present danger to the Temple University community.

8. Since Dean Reinstein's determination that Mr. Herbert presented a clear and present danger is supported by evidence in the record, this Court finds that the Dean did not suspend Mr. Herbert because the Dean disapproved of Mr. Herbert's political beliefs. This Court thus rejects Mr. Herbert's argument that the Dean's "clear and present danger" argument was a mere pretext.

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8. This Court finds that Mr. Herbert received all process that he was due at the formal hearing before the student panel.

First, Mr. Herbert was represented by two attorneys, both of whom actively participated in the hearing. Mr. Herbert's attorneys had the opportunity to object to the hearing officer's instructions to the hearing panel and did not do so. Moreover, Mr. Herbert's counsel did not request that any form of special interrogatories be given to the panel to complete during deliberations. Mr. Herbert's counsel merely requested, at a *later* sanctions hearing, that the jury be polled. Consequently, this Court will not now disturb the hearing panel's decision based on Mr. Herbert's belated argument that the instructions were unclear.

Second, this Court rejects Mr. Herbert's argument that he was deprived of due process because the formal hearing was closed to the public. The code of conduct provides that a student accused of violating the code is entitled to an open hearing if the student files a written motion at least five days before the hearing. In this case, Mr. Herbert failed to abide by these rules. When he raised the issue at his hearing on October 3, 1994, it was too late for the hearing officer logistically to plan for an open hearing.

Finally, this Court notes for the record that, contrary to Mr. Herbert's argument that the hearing was a quasi-criminal proceeding, there is no requirement that the technicalities of criminal procedure be applied in school suspension cases. *Brewer v. Austin Indep. School Dist.*, 779 F.2d 260, 263 (5th Cir. 1985). *See also Nash v. Auburn University*, 812 F.2d 655, 664 (11th Cir. 1987) (*citations omitted*). Rather, the appropriate standard is that cited in *Goss*.

Appendix A

An appropriate Order follows.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

Appendix A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 94-5765

LINCOLN HERBERT,

Plaintiff,

v.

TEMPLE UNIVERSITY
TEMPLE UNIVERSITY SCHOOL OF LAW
ROBERT REINSTEIN, DEAN

Defendants.

ORDER

AND NOW, this 20th day of October, 1994, upon consideration of Plaintiffs' Motion for Preliminary Injunction, considered by the Court as a motion for final injunctive relief, and Defendants' response thereto, and consistent with the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that the motion is DENIED. Judgment is entered in favor of Defendants and against Plaintiff.

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 6, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2138

LINCOLN HERBERT,

Appellant

v.

ROBERT J. REINSTEIN, DEAN OF
TEMPLE UNIVERSITY SCHOOL OF LAW &
VICE-PRESIDENT OF TEMPLE UNIVERSITY;
TEMPLE UNIVERSITY SCHOOL OF LAW;
TEMPLE UNIVERSITY

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 94-05765)
District Judge: Honorable Clarence C. Newcomer

Submitted under Third Circuit LAR 34.1(a)
May 18, 1995

BEFORE: STAPLETON, GREENBERG and ALITO,
Circuit Judges

OPINION OF THE COURT

OCT 06 1995

Appendix B

GREENBERG, *Circuit Judge*.

This civil rights action is before this court on appeal by Lincoln Herbert, appearing *pro se*, from a final order entered on October 21, 1994, denying him injunctive relief and entering judgment for the appellees, Robert J. Reinstein, Dean of the Temple University Law School, and the school and the university. We determine that the appellees did not provide Herbert with procedural due process at his pre-suspension hearing pending a formal disciplinary hearing, and thus we will reverse the order in part and will remand the matter for further proceedings. We conclude, however, that at the subsequent formal hearing before the Law School Disciplinary Committee the appellees afforded Herbert with procedural due process. Inasmuch as Herbert currently is suspended as a result of this hearing, we will deny him injunctive relief.

I. FACTUAL BACKGROUND

Herbert attended Temple University Law School, starting in 1991. He is the founder of the Western Heritage Society, which the district court characterized as "a politically 'right-wing' student organization" whose "viewpoints were unpopular among many students, faculty, and administrators at Temple University and the law school." Findings of Fact and Conclusions of Law at 2. This organization sponsored lectures at the law school, published a newsletter, and placed posters in the law school building. On April 18, 1994, Dean Reinstein issued a written message that was addressed to the "Law School Community" and that denounced the organization.[1] During his

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1. The Dean's written message reads as follows:

To the Law School Community:

A small number of students who identify themselves as the Western Heritage Society have repeatedly posted

(Cont'd)

attendance, Herbert was involved in several incidents that could be viewed as demonstrating that he has an aggressive nature. He quarreled with the owner of a food truck parked regularly outside the law school. He took an eleven-year-old girl to the Dean's office after observing her removing a Western Heritage Society poster, whereupon the child burst into tears. The child's mother notified the school that Herbert later approached her daughter again; she asked that he be kept away from the child. Several employees of the school also complained about Herbert's hostile behavior towards them.

(Cont'd)

> messages of vitriol and hatred in the building. Their apparent purpose is to verbally assault individuals and groups within our community.
>
> The Law School does not have a speech code that prohibits hateful expression. I firmly believe that such prohibitions would be wrong and counter-productive. An academic community must allow the widest latitude for free speech — even speech that tests the outer limits of tolerance. The expression of ideas that we despise cannot be suppressed without endangering those we embrace.
>
> However, legal protection should not be confused with moral approval. The members of the Western Heritage Society should not be left in doubt that the practice of expressing hate speech is reprehensible; that it disqualifies them from being considered serious participants in legitimate political debate; and that their efforts to degrade others serve to discredit and diminish themselves.
>
> /s/
> Robert J. Reinstein
> Dean

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Herbert was also involved in an incident at an off-campus restaurant. The police report indicated that Herbert had seen a man wielding a knife in the restaurant. After the police were called the man left, but Herbert followed him outside and sprayed pepper gas at him. Upon their arrival, the police saw the man holding the knife at his side and told him to drop it. While they attempted to disarm the man, Herbert again sprayed pepper gas at the man.

On the evening of May 3, 1994, a man, later identified as Mark Thompson, approached Herbert outside the law school and asked him for money. Herbert claimed that when he refused, Thompson told him that he had a knife and appeared to reach for it. Herbert then sprayed pepper gas in Thompson's face and went through the two sets of doors that led into the law school lobby. Herbert then informed the security guard that Thompson had threatened him with a knife. After the guard called the campus police, Herbert repeated his account to them over the telephone. Next, Thompson came through the first set of doors, shouting at Herbert. When Thompson began to come through the second, inner set of doors, Herbert sprayed him again with the pepper spray. Thompson retreated. Later, the police searched Thompson and the surrounding area without finding a knife. Residual spray in the air caused considerable irritation to one of the school employees who later passed through the area.

On the following day, Assistant Dean Adelaide Ferguson investigated the incident and interviewed people who witnessed the events in the lobby. She reported her findings to Dean Reinstein, who also reviewed campus police reports and met with the campus police. On May 5, 1994, Dean Reinstein wrote the following to Herbert:

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> I have received several reports from witnesses to an incident that occurred in the Law School lobby on the evening of Tuesday, May 3 which provide reason to conclude that YOU committed an act of violence which harmed several of our employees and a stranger in violation of Temple Law School's Code of Student Conduct. The reports also give me reason to believe that your continued presence in the Law School may pose a clear and present danger to members of the Law School community.

The letter also indicated that Dean Reinstein was considering suspending Herbert and it invited Herbert to meet with him that day to present his account of the incident.

During this meeting on May 5, Herbert explained to Dean Reinstein that Thompson had said that he had a knife, made a threatening movement towards his pocket, and rushed at Herbert. Herbert then sprayed him the first time, outside the building. He also stated that when Thompson started to come into the lobby, he sprayed him again. Herbert also brought up the incident at the restaurant during this meeting. He claimed, however, that the man at the restaurant was lunging at him when the police arrived. Dean Reinstein considered this explanation dubious as it was not supported by the police report that he had read previously.

After this initial meeting, Dean Reinstein continued to investigate the matter. He met again with the campus police, who opined that Herbert's actions were unjustified because they did not find a knife in the vicinity. That afternoon, Dean Reinstein met with Herbert for a second time and suspended him "pending a full investigation by the Disciplinary Counsel."

Appellees Br. at 16. The Dean testified that he thought that Herbert "presented a real threat to the people who worked and studied there."

Thus, beginning on May 5, 1994, the appellees did not permit Herbert to be physically present on the Temple campus. As that date was during the examination period, the appellees allowed Herbert to take his final examinations at home. He therefore was able to complete the spring semester and did so.

Dean Reinstein then referred Herbert's case to the school's disciplinary counsel. Due to his examination schedule, however, Herbert requested that the disciplinary counsel delay its investigation until the end of the examination period. Accordingly, the investigation began on May 23, 1994. In a letter to Herbert dated June 14, 1994, the disciplinary counsel formally charged Herbert with violating two sections of the law school disciplinary code by "committing an act of physical violence or intimidation against members of the law school community," and by "communicat[ing] serious falsehoods to a member of the Faculty or Administration concerning official business of the law school." A hearing was set before the Law School Disciplinary Committee on June 29, 1994.

Nevertheless, to honor one request from the disciplinary counsel and three requests from Herbert for delays, the hearing was not held until October 3, 1994. Herbert was represented by counsel at that hearing. A panel of students and faculty members found that Herbert did not engage in violence against a member of the law school community because Thompson was not associated with the school but that Herbert did communicate serious falsehoods to Dean Reinstein concerning official business of the school. The panel decided to suspend Herbert

from attending the law school until June 1997. It also required him to undergo 100 hours of psychological counselling and perform 100 hours of community service before being readmitted.

II. PROCEDURAL BACKGROUND

On September 21, 1994, while the disciplinary proceeding was pending within the school, Herbert filed a pro se complaint in the district court against Dean Reinstein, the law school, and Temple University. The complaint alleged that, in suspending him, the appellees denied him due process of law and infringed his free speech and free association rights in violation of 42 U.S.C. § 1983. Herbert requested declaratory and injunctive relief, compensatory damages of $6,000,000, and punitive damages. At the same time, Herbert also filed a motion for a temporary restraining order seeking immediate readmission to the law school.

After a conference with the parties, the district court entered an order, dated September 21, 1994, denying the motion for a temporary restraining order and directing the parties to appear on September 30, 1994, "for a full and final hearing on the merits of this case," thus consolidating the request for a preliminary injunction with the trial on the merits. Due to postponement by the court, the hearing was held on October 13 and 18, 1994. On October 20, 1994, the district court rendered its findings of facts and conclusions of law. The court found that the appellees met the due process requirements set forth in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975), for suspensions of up to ten days, as well as those set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976), for suspensions of more than ten days. It also stated that it would

consider only Herbert's due process claims because it found that although he "alleged at trial that defendants' actions also violated his First Amendment rights of free speech and free association, he failed to sufficiently plead these claims in his Complaint." *Herbert v. Reinstein*, No. 94-5765, Findings of Fact and Conclusions of Law at 6 n.2 (E.D. Pa. Oct. 20, 1994). The court's order stated that it considered Herbert's motion for preliminary injunction "as a motion for final injunctive relief" and that said motion was denied.

III. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over this civil rights action pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's denial of a motion for injunctive relief under an abuse of discretion standard. *International Union v. Mack Trucks, Inc.*, 820 F.2d 91, 94 (3d Cir. 1987). "An abuse of discretion exists where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Id.* at 95 (citation omitted).

IV. DISCUSSION

A. Procedural Due Process

The parties agree that Herbert has a constitutionally protected property interest in continued education at this state-supported law school. *Goss v. Lopez*, 419 U.S. at 576, 95 S.Ct. at 737. The school therefore may not suspend him without due process of law. *Id.* Under *Goss*, a suspension of ten days or less

requires "that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story." *Id.* at 581, 95 S.Ct. at 740. "[I]n being given an opportunity to explain his version of the facts . . . , the student [must] first be told what he is accused of doing and what the basis of the accusation is." *Id.* at 582, 95 S.Ct. at 740. Where the student's presence "poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process," he may be removed immediately and be given the notice and hearing as soon as practicable thereafter. *Id.* at 582-83, 95 S.Ct. at 740.

For longer suspensions and expulsions or more severe penalties, the *Goss* Court indicated that more formal procedures might be required. In those cases, a court should consider the factors itemized in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976), to determine whether enhanced process is required. Those factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S.Ct. at 903.

The record, as well as the appellees' brief, indicates that Herbert was not given notice of all the reasons on which his

suspension was based. Prior to suspending Herbert. Dean Reinstein expressed to Herbert only his disapproval of the incident involving Thompson. And although they discussed the incident at the restaurant during the first pre-suspension meeting on May 5, it appears that Dean Reinstein did not express then his disapproval of that incident or of Herbert's view of that incident.

The district court found that the Dean "was aware" of the other troublesome incidents and complaints involving Herbert, but it does not appear that Dean Reinstein gave Herbert pre-suspension notice that these other incidents and complaints could be the basis for a suspension. Nevertheless, appellees' brief indicates that the suspension was based in part on these earlier problems. *See* Br. at 13. We think that this point is important, as we cannot conclude that the dean would have suspended Herbert and called him a "clear and present danger" solely because he disbelieved Herbert's accounts of the incidents with Thompson and at the restaurant. After all, Herbert only said that Thompson claimed to have a knife, not that Thompson did have a knife. Accordingly, the fact that the police did not find a knife hardly discredits Herbert's statement.

"The right to a hearing is certainly of little value without prior notice of the charges presented, in sufficient detail fairly to enable the party charged to demonstrate any error that might exist." *Cohen v. City of Philadelphia*, 736 F.2d 81, 84 (3d Cir.) (citing *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed.2d 865 (1950)), *cert. denied*, 469 U.S. 1019, 105 S.Ct. 434 (1984); *see also Johnson v. Orr*, 776 F.2d 75, 79 (3d Cir. 1985). Thus, in *Fraternal Order of Police Lodge No. 5 v. Tucker*, 868 F.2d 74,

80 (3d Cir. 1989), we held that the plaintiffs, who were police officers, were denied due process where they were informed generally of a complaint regarding drug use by police officers but were not told about the specific allegations under investigation or the evidence regarding such allegations. We held that without sufficient specificity of the allegations, the plaintiffs and their attorneys really had no opportunity to explain or rebut the charges. *Id.*; *see also Linton v. Frederick County Bd. of County Comm'rs*, 964 F.2d 1436, 1440-41 (4th Cir. 1992) (general charges of "other incidents" "provide inadequate information to focus [employee] on the operative conduct relied on to fire him").

Similarly, courts have required schools to disclose all relevant charges or allegations on which they base their disciplinary actions so that if those charges are rebutted sufficiently, the student would be exonerated fully. For example, in *Strickland v. Inlow*, 519 F.2d 744, 746-47 (8th Cir. 1975), two students were suspended for "spiking" the punch at a home economics function. The school board, however, based its initial decision to suspend them in part on another charge, undisclosed to the students, that one of them had been involved in a fight at a basketball game. The Court of Appeals for the Eighth Circuit held that the students were denied procedural due process: "[i]gnorant of the scope of the matter under consideration, the plaintiffs' opportunity to present their side of the case was rendered meaningless. . . . They could not refute the factual basis of the Board's decision by showing their innocence of the additional wrongdoing." *Id.* at 747.

Similarly, in *Newsome v. Batavia Local School Dist.*, 842 F.2d 920, 927-28 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit held that a student was denied procedural due

process when the superintendent disclosed to the school board but not to the student certain evidence regarding his possession of marijuana. "Such a tactic completely deprived [the student] of any opportunity to rebut the evidence and amounted to a clear deprivation of his right to procedural due process of law." *Id.* 928.

In this case, the law school failed to provide Herbert with the process outlined in *Goss*. Prior to suspending Herbert on May 5, 1994, Dean Reinstein did not indicate to him that the suspension was based partially on incidents other than the one involving Thompson. Even if Herbert was able to convince the Dean that he was not to blame for what happened in the law school lobby on May 3, he had no notice that he also had to justify himself with respect to the other events and complaints in order to avoid suspension.[2]

The *Goss* Court recognized, however, that there may be situations in which prior notice and hearing may be impracticable:

> Students whose presence poses a continuing danger to persons or property or an ongoing threat of

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2. The district court also noted the issue of whether the Dean's initial suspension of Herbert constituted a suspension of more than ten days. Dean Reinstein initially suspended Herbert on May 5, 1994, during the examination period at the end of the semester. Since Herbert was allowed to take his exams at home, he did not miss any class time that semester. He was denied, however, access to other facilities at the school. Due largely to Herbert's requests, the disciplinary investigation and the hearing were postponed such that this initial suspension lasted until October 1994. Because Herbert had insufficient notice of the reasons on which his suspension was based, we need not decide whether the *Goss* standard or the *Mathews* standard applies.

> disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . .

Goss, 419 U.S. at 582-83, 95 S.Ct. at 740. In his letter to Herbert dated May 5, 1994, Dean Reinstein stated that he believed Herbert's presence in the law school to have posed a "clear and present danger." The district court found that this conclusion was reasonable, given the dean's familiarity with the reports on the incident involving Mark Thompson as well as the prior events and complaints. Thus, the court concluded that the subsequent hearing on adequate notice before the Disciplinary Committee provided due process.

We cannot, however, accept that conclusion with respect to the suspension prior to that imposed by the Disciplinary Committee. First, the *Goss* Court, in carving out the exception from the general rule requiring prior notice and hearing, did not rest its reasoning only on the fact that the student may pose a danger or threaten to disrupt the academic process. The Court also indicated that these situations were limited to those in which prior notice and hearing cannot be given as a practical matter. This may be seen from the Court's explanation of the rule and the exception. The Court first stated that the requirement for prior notice and hearing is fairly rudimentary. Thus, notice may be given at the time of the hearing. *Goss*, 419 U.S. at 582, 95 S.Ct. at 740. "In the great majority of cases," the informal hearing may take place almost immediately following the misconduct. *Id.* It is only in those situations "in which prior notice and hearing cannot be insisted upon" that they may be postponed until after the removal of the student. *Id.* Accordingly, before the exception to the rule requiring prior

notice and hearing may be applied, a court must find that such due process safeguards could not, as a practical matter, reasonably be required because of the intolerable nature of the student.

Here, although Herbert may have posed a physical danger to the law school community, he was not suspended immediately after any alleged misconduct. Even if it were reasonable to say that the May 3 incident involving Thompson showed that Herbert posed a "clear and present danger," Herbert was not removed from the school at that time. Nor did the appellees bar him from the school on May 4. Dean Reinstein did not suspend him until May 5, after he carefully investigated this incident, and then only after meeting with him twice. Moreover, far from not being able, as a practicable matter, to give Herbert notice and a hearing prior to suspending him, the dean attempted to provide Herbert with both. Dean Reinstein wrote the letter to Herbert indicating that Herbert may be suspended for posing a "clear and present danger," discussed the May 3 incident with Herbert, and listened to Herbert's explanation of it. The problem, therefore, was not that Dean Reinstein could not give Herbert prior notice and hearing. Rather, it was that Dean Reinstein, although clearly attempting to respect Herbert's due process rights, nevertheless gave him an inadequate notice and hearing. As the district court found and the appellees admit, Dean Reinstein was aware of the prior incidents and complaints and drew from them his conclusion that Herbert was a "clear and present danger." Yet, Dean Reinstein did not give Herbert even an informal charge of these past problems.

Second, the *Goss* Court required that in the event that a student is removed from school before notice and a hearing

can be given, "the necessary notice and rudimentary hearing should follow as soon as practicable." *Goss*, 419 U.S. at 582-83, 95 S.Ct. at 740. If Dean Reinstein had deemed it imperative to suspend Herbert immediately, without providing these informal due process requirements, the appellees' argument still would fail because they never provided such due process afterwards. On May 5, 1994, Dean Reinstein suspended Herbert pending a full investigation by the school's disciplinary counsel. The disciplinary counsel's investigation led to the formal charge on June 14, 1994 that Herbert violated the school's code of conduct, and eventually to the hearing before the school disciplinary panel.[3] Neither the formal charges nor the panel hearing, however, explained to Herbert all the reasons why Dean Reinstein suspended him initially, pending the full investigation by the disciplinary counsel.

Moreover, the formal charges and panel hearing were not what *Goss* requires, which is simply that the student "be told what he is accused of doing and what the basis of the accusation is" and "be given an opportunity to explain his version of the facts." *Id.* at 582, 95 S.Ct. at 740. If the school could not, as a practical matter, give Herbert such preliminary process prior to suspending him on May 5, 1994, it should have provided it soon after. The school need not have waited for its formal disciplinary process before notifying him of *all* the reasons on which his suspension was based and giving him an opportunity to explain or refute them. Furthermore, it is unclear that Herbert ever received notice of these other grounds for his initial suspension prior to the initiation of this civil suit.

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3. Due to their accommodation of Herbert's various requests, the school did not charge Herbert formally with violations of the school's code of conduct until June 14, 1994. And due in part to Herbert's requests, his hearing before the school disciplinary panel did not occur until October, 1994.

Since we find that appellees violated Herbert's right to procedural due process in their actions to suspend him, we will remand the case to the district court for declaratory relief and determination of damages.[4] In doing so, the district court, even if it determines that the initial suspension substantively was justified, should take into account *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1054 (1978), which states that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury." However, we conclude that the proceedings before the Disciplinary Committee were constitutionally adequate and thus, as Herbert was suspended by the Committee, he is not entitled to injunctive relief. Furthermore, the court should, in considering damages, take into account that Herbert ultimately was suspended in procedurally proper proceedings.

B. Consolidation of the Case

We discuss briefly the scope of the case on remand in response to two of Herbert's procedural arguments. Herbert contends that the district court erred in consolidating his request for a preliminary injunction with a trial of the action on the merits under Federal Rule of Civil Procedure 65(a)(2), alleging that the court gave him insufficient notice of its intent. The docket, however, reflects that the court held a conference with the parties, after which it entered an order dated September 21, 1994, denying Herbert's motion for a temporary restraining order and requiring explicitly that the parties appear on September 30, 1994 (later changed to October 13) "for a full and final hearing on the merits of this case."

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4. Although the district court disposed of his case by only denying the injunctive relief, Herbert also requested declaratory relief, compensatory damages, and punitive damages.

Appendix B

Although Herbert was appearing pro se at the start of his case and during the conference, he retained counsel prior to the hearing and counsel represented him at the hearing. His attorney should have realized from the order that the court was hearing the case on a consolidated basis. At the start of the hearing, however, Herbert's attorney appeared to have been taken by surprise when the court announced that the case was being heard on a consolidated basis. At this response, the district court noted that the parties had agreed to the consolidation at conference, and Herbert's counsel did not object. Nor did he voice any objection over this issue during the two-day-long trial. Furthermore, it appears that Herbert was able to present his entire case on liability. Accordingly, it would be prejudicial to appellees, who proceeded in good faith to defend themselves according to the court-ordered schedule, if the case were allowed to be reopened on the basis that the preliminary and final aspects of the case should not have been consolidated. Therefore, we will not require that by reason of the consolidation that the district court hold another trial on liability.

Herbert's second procedural contention is that the procedure followed deprived him of a right to a jury trial. We, however, reject this contention because he never sought a jury trial by demanding one under Fed. R. Civ. P. 38(b). While he suggests that he had no opportunity to seek a jury trial, his failure even to attempt to do so forecloses that argument here.

Finally, we note that Herbert explicitly has chosen not to appeal certain issues, relying on this court to require another trial on the merits. In particular, the district court dismissed Herbert's allegations of First Amendment violations, concluding that although Herbert made such allegations at trial, "he failed to sufficiently plead these claims in his Complaint." Findings of Fact and Conclusions of Law at 6 n.1. But Herbert

chose explicitly not to appeal this issue.[5] Br. at 3; Reply Br. at iv. Herbert's reliance on obtaining another trial is misplaced. Even if we were to require another trial on the merits, the district court still would be faced with what it believed to be a complaint that inadequately pled First Amendment violations. Since Herbert waived explicitly this issue on appeal and neither party has briefed this issue, however, we decline to review it.

V. CONCLUSION

For the above reasons, we will reverse the order of October 21, 1994, insofar as it entered judgment for the appellees, but we will affirm it insofar as it denied injunctive relief. We will remand the case to the district court for determination of damages and entry of declaratory relief in favor of Herbert. The parties will bear their own costs on this appeal.

TO THE CLERK:

Please file the foregoing opinion.

s/ [illegible]
Circuit Judge

DATED:

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5. Herbert does argue on appeal that his speech activities caused Dean Reinstein to be biased against him and therefore the Dean could not have given him a constitutionally sufficient pre-suspension hearing. Since we found that Herbert was not given adequate notice, we need not reach this issue. We note, however, that Herbert is not entitled to be heard before an impartial decision-maker at every step of his suspension process. The school and the state would have satisfied constitutional requirements if they offered a post-suspension hearing before an impartial adjudicator who would be able to correct any pre-suspension bias. *McDaniels v. Flick*, 59 F.3d 446, 459-61 3d Cir. 1995) (employee not entitled to impartial adjudicator prior to termination if post-termination process would allow for correction).

Appendix B

HERBERT v. REINSTEIN, No. 94-2138

s/ [illegible]
STAPLETON, *Circuit J.*, dissenting:

I respectfully dissent.

The procedural component of due process of law requires only that there be a reasonable accommodation between the individual's interest in a reliable determination of the relevant facts and law and any competing interests of the state. This is the teaching of *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Goss* case reflects an application of this basic principle in the context of suspensions of public high school students. *Goss v. Lopez*, 419 U.S. 565 (1975). For present purposes, the most important thing about *Goss* is its recognition that the state has a compelling interest in the security of its citizens and property, to which an individual's interest in pre-deprivation process must yield.[1]

Based on these principles, I would hold that Herbert, prior to his exclusion from the campus, was at most entitled to (1) oral notice of the fact that the University, as a result of the

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1. The Court held, in part:

> We agree . . . that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . .

419 U.S. at 582-83.

May 3rd incident, was considering his exclusion in order to protect the members and property of the school community, and (2) an immediate opportunity to state why his exclusion was not necessary. I would affirm the judgment of the district court because Herbert received such notice in writing and was afforded such an opportunity. Moreover, if due process would otherwise have required the University to provide Herbert with pre-exclusion notice of all information known to the Dean on May 5th that might be relevant to the exclusion issue, the emergency exception recognized in *Goss* would have authorized Herbert's immediate exclusion with no pre-exclusion process.

Assistant Dean Adelaide Ferguson received notice of the library incident on the morning of May 4th and immediately instituted an investigation. She informed the Dean of the information she learned, and he continued the investigation on May 5th. During the morning of that day, his investigation included an interview with Herbert concerning the library incident, conducted after written notice to him that his exclusion was being considered as a result of that incident. By afternoon, the information available to the Dean led him to the reasonable conclusion that Herbert's presence on campus presented an unacceptable risk to the school community. He personally advised Herbert of his conclusion and referred the matter to the disciplinary counsel for a full investigation and prompt, appropriate process.

The investigation by the disciplinary counsel was delayed at Herbert's request, and he was not formally charged with disciplinary violations until a little over a month after the suspension. Given Herbert's request for a delay in the investigation and the fact that he was permitted to complete and receive credit for the semester, I do not view the filing of

formal charges as less than prompt. Similarly, while the hearing on the formal charges did not occur until October, this was largely attributable to Herbert's requests for continuances and the delay, accordingly, was not unreasonable.

Unlike the majority, I find it hard to fault the Dean's handling of this matter. This was the kind of situation in which it was in everyone's interest to investigate before any action was taken. At the same time, there were indications that the school community might be at risk. As a result, the Dean and his assistant conducted an expedited, preliminary investigation of the library incident over a period of a day and a half. If their expedited, preliminary investigation had not convinced the Dean in the early afternoon of May 5th that Herbert posed an unacceptable risk to the school community, the investigation would have continued, charges would have been filed in accordance with the University's disciplinary rules, a hearing would have been held under those rules, and Herbert only then would have been suspended. As it happened however, the Dean, after notifying Herbert that his exclusion was being considered and after listening to Herbert's side of the story, came to reasonably believe that there was an immediate threat and he acted appropriately in response.

As I understand the court's opinion, it faults the Dean on two grounds. First, it concludes that there could be no exclusion consistent with due process until the Dean gave Herbert notice of all information in his possession relevant to the exclusion issue and held a hearing at which Herbert would have the opportunity to rebut all of that data or put it in the best perspective possible. I am unable to accept this conclusion.

The scope of the notice required by the court does not, in my judgment, strike a realistic balance between the needs of

one in Herbert's position and the needs of the institution. Herbert was told that the library incident had prompted an investigation and had raised concern about whether the school community needed protection from aggressive behavior on his part. He was also given the opportunity to give his own account of the events of the night of May 3rd and to urge that his exclusion was not necessary to the security of the school community. While he might have preferred to receive advance notice of all potentially relevant information known to the University, the absence of such notice did not preclude him from addressing the exclusion issue in a meaningful way and a requirement of such notice would have been an unreasonable burden to the University in its effort to determine whether it needed to take steps to protect itself. It is simply not possible for an institution in the University's position to know prior to completing its preliminary investigation just what information will be relevant and important to the decision or exclusion. That will necessarily depend on what surfaces during the investigation, including what is disclosed during its interview with the student alleged to present a threat.

I do not understand the court to suggest that the Dean was prohibited from interviewing Herbert as a part of his expedited, preliminary investigation. Herbert was an important source of information about the May 3rd incident and the Dean would have been remiss if he had failed to interview Herbert. Apparently, the court contemplates that once the Dean completed his preliminary investigation, he should have notified Herbert of the information then known to the Dean, including the information concerning the half dozen or so prior incidents in which someone reported observing aggressive behavior on the part of Herbert. This would then be followed by a hearing during which Herbert would be able to respond to everything known to the Dean.

Appendix B

While it is true that it might have been possible for the Dean at the conclusion of his preliminary investigation to provide to Herbert a catalog of the available information, I do not believe such a catalog would have had any even marginal effect on the reliability of the process afforded unless it had been provided in writing and unless some reasonable opportunity had been provided prior to the hearing to permit preparation of Herbert's rebuttal. This, however, would have required the University to assume a risk that due process does not require it to assume.

The court reads *Goss* as imposing two requirements for a constitutionally valid emergency suspension without pre-deprivation process: (1) a reasonable perception on the part of the decisionmaker of an unreasonable risk to persons or property, and (2) an "impracticability" of affording notice of, and a hearing concerning, all of the information giving rise to the perception. Given the court's disposition of this case, it is not clear to me what the court would regard as a situation in which it is "impractical" to afford notice and a hearing. If the purposes of procedural due process protection and the emergency exception are to be served, however, the issue posed by the second requirement has to be whether a meaningful notice and hearing can be afforded *without subjecting persons and property to the risk that has reasonably been found unacceptable.* The sensible teaching of *Goss* is that once an official responsible for the security of a public institution concludes that that security is threatened, he or she does not have to tolerate the continuation of that risk.

Where the subject of an investigation is physically present and the subject matter of the investigation permits an immediate notice and hearing that will be meaningful, the responsible

official will normally be able to listen to the subject's side of the story before the decision on exclusion without assuming any additional risk. Given the scope of the notice and hearing required by the court in this case, however, a meaningful pre-exclusion notice and reasonable preparation time before the hearing would have taken a significant period of time during which the risk perceived by Dean Reinstein would have continued. Due process, in my judgment, did not require assumption of that risk.

The second ground on which the court faults the Dean relates to the failure to give Herbert a post-exclusion notice and hearing regarding the basis for the exclusion. The court apparently regards such notice and hearing as distinguishable from the notice and hearing that was afforded on the June 14th charges. Unlike the court, I do not perceive a due process violation here. Where a fuller but prompt investigation results in a recasting of the formal charges and a prompt hearing is held on those formal charges, I do not believe due process requires that an institution go back and hold a hearing regarding the information available at the end of the preliminary investigation.

For these reasons, I would affirm the judgment of the district court.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED FEBRUARY 23, 1996 AND ENTERED AND FILED FEBRUARY 26, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 94-5765

LINCOLN HERBERT

V.

TEMPLE UNIVERSITY SCHOOL OF LAW, ROBERT REINSTEIN, DEAN, AND TEMPLE UNIVERSITY

Newcomer, J. February 23, 1996

MEMORANDUM

I. Background

In October 1994, this Court presided over a bench trial at which plaintiff Lincoln Herbert claimed that defendants Temple University, Temple University Law School, and Dean Robert Reinstein violated his constitutional rights by suspending him without due process.

The facts leading up to the suspension are as follows. On May 4, 1994, Dean Reinstein received reports that Lincoln Herbert had committed an attack inside the law school with pepper gas on the previous night. The incident resulted in the

hospitalization of one law school employee due to inhalation of the pepper gas. Dean Reinstein and Assistant Dean Adelaide Ferguson investigated the incident that day.

On the morning of May 5, 1994, Dean Reinstein summoned Herbert to his office in order to hear Herbert's side of the story. At that meeting, Herbert claimed that he used the pepper gas only to defend himself against the advances of a homeless man who had chased him inside the building with a knife. Later that afternoon, following subsequent investigations, Dean Reinstein called Herbert into his office and suspended him. Dean Reinstein based this decision partly on additional information that he possessed concerning previous altercations between Herbert and individuals affiliated with the law school. Dean Reinstein then suspended Herbert on the ground that Herbert posed a clear and present danger to the safety of the law school community.

Although Dean Reinstein suspended Herbert before the semester had ended, the Dean permitted Herbert to take his final examinations at home. Herbert did so and received the highest grades of his law school career. Dean Reinstein also referred the case to the law school's Disciplinary Committee, which scheduled a hearing for June 21, 1994. At Herbert's request, the hearing was continued three times and finally took place on October 3, 1994.

In September 1994, Herbert filed this case in this Court seeking a temporary restraining order ordering Dean Reinstein to lift the suspension. This Court denied the motion for a temporary restraining order. The Disciplinary Committee eventually voted to suspend Herbert from the law school until January 1997. The Committee also ordered psychotherapy and community service as prerequisites for Herbert's reenrolling in the law school.

Appendix C

a. This Court's Ruling Following the Bench Trial:

Herbert claimed that defendants violated his right to procedural due process under the Fourteenth Amendment.[1] He claimed that both Dean Reinstein's May 5, 1994 suspension and the Disciplinary Committee's October 1994 suspension violated his procedural due process rights.

This Court rejected Herbert's arguments. Following a bench trial, this Court found that Herbert received all process to which he was entitled under the Supreme Court's standard in *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (student must be provided with oral or written notice of charges against him and opportunity to deny and explain charges against him). This Court denied Herbert's request for injunctive relief. Herbert then appealed to the Third Circuit Court of Appeals.

b. The Third Circuit's Ruling After Appeal:

The Third Circuit affirmed this Court's denial of injunctive relief. The Third Circuit also affirmed this Court's finding that Herbert was provided with adequate due process at the Disciplinary Committee hearing.[2]

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1. He also claimed violation of his First Amendment rights to free speech and free association. He did not raise these arguments at trial, and the Third Circuit held that he waived his right to argue these issues on appeal.

2. The Third Circuit's opinion is, in some respects, internally inconsistent. On the one hand, the court characterizes the Disciplinary Committee's proceedings as sufficient, stating as follows:

(Cont'd)

Appendix C

The Third Circuit reversed and remanded, however, on the ground that Herbert was deprived of procedural due process at the May 5, 1994 suspension in Dean Reinstein's office. The Third Circuit found that, because Dean Reinstein had relied on information regarding Herbert's involvement in other incidents at or near the law school without notifying Herbert, Herbert was not provided with an adequate opportunity, according to *Goss*, to explain those incidents. The Third Circuit remanded for entry of declaratory relief in favor of Herbert on this point and for determination of damages.

A damages hearing took place before this Court on February 20, 1996. Following are the findings of fact and

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(Cont'd)

> [W]e conclude that the proceedings before the Disciplinary Committee were constitutionally adequate and thus, as Herbert was suspended by the Committee, he was not entitled to injunctive relief. Furthermore, the court should, in considering damages, take into account that Herbert ultimately was suspended in procedurally proper proceedings.

Opinion at 17-18. On the other hand, the Third Circuit suggested that defendants *never* gave Herbert notice of all of the reasons relied upon by Dean Reinstein:

> Neither the formal charges nor the panel hearing, however, explained to Herbert all the reasons why Dean Reinstein suspended him initially, pending the full investigation by the disciplinary counsel. . . Moreover, the formal charges and panel hearing were not what *Goss* requires. . . Furthermore, it is unclear that Herbert ever received notice of these other grounds for his initial suspension prior to the initiation of this civil suit.

Opinion at 16-17.

conclusions of law made after careful consideration of the testimony of the witnesses, the arguments of plaintiff and defense counsel, and the opinion of the Third Circuit dated October 6, 1995.[3]

II. Findings of Fact

1. Dean Reinstein suspended Herbert on May 5, 1994 after concluding that Herbert posed a clear and present danger to the safety of the law school community.

2. Dean Reinstein based this decision on his informed understanding of the May 3, 1994 incident concerning the pepper gas. Dean Reinstein also buttressed his decision with his knowledge of several prior incidents involving Lincoln Herbert.

3. The other incidents included an altercation between Mr. Herbert and the owner of a food truck parked daily outside the law school; an episode in which Mr. Herbert allegedly acted aggressively toward the eleven year old daughter of a Temple University student; and an incident of violence involving Mr. Herbert and the police at a Chinese restaurant located near the University.

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3. Several days before the hearing, defense counsel submitted to this Court a trial brief outlining their position. At the hearing, Herbert asked this Court to permit him to present a brief outlining his own legal arguments. Herbert promised this Court, on the record, that he would file the brief by the morning of February 21, 1996. As of February 22, 1996, he still has not filed the brief, despite at least three telephone calls to Chambers promising that the brief was "on its way." Accordingly, this Court will proceed without the brief.

3. The Third Circuit has held that the Dean's failure to notify Herbert that the Dean was considering these other incidents constitutes a violation of Herbert's right to procedural due process.

4. Herbert has not denied that these incidents took place. Instead, the defense contends, and Herbert does not dispute, that Herbert discussed each of these incidents as they occurred with members of the Temple Law School administration, primarily Assistant Dean Adelaide Ferguson.

5. Herbert did not demonstrate that he would have denied those allegations on May 5, 1994 even if Dean Reinstein had informed Herbert that he was considering them.

6. Following the May 5, 1994 suspension, Herbert's reputation in the law school community suffered. Prior to the suspension, Herbert's reputation in the community was that of a sometimes rude and verbally aggressive, but not violent, person. Following the suspension, his reputation was that of an individual prone to a violent propensity on one or more occasions.

7. Herbert has not demonstrated, that Dean Reinstein or any agent of Temple University was responsible for the decline in Herbert's reputation. Specifically, Herbert has not demonstrated that any Temple University agent disclosed ("published") the circumstances surrounding Herbert's suspension to any person other than Herbert. Rather, Herbert himself described the suspension to various members of the law school student body. He also contacted several newspapers and periodicals, including the Philadelphia Inquirer, the Washington Times, the Montgomery County Observer, and the National Review magazine. Herbert's self-described purpose in contacting these

members of the press was to "tell [his] side of the story." In addition, Herbert distributed leaflets at the law school which lambasted the Temple Law School administration for his predicament. The leafletting took place on at least three occasions: graduation exercises in 1994 and 1995, and a law school open house.

8. Herbert contends that he suffered severe emotional distress. The evidence presented at the hearing demonstrates that his distress stemmed from the actual suspension, and not from the fact that Dean Reinstein failed to inform him that the Dean had considered the previous incidents.

III. Conclusions of Law

1. This Court is bound by the decisions of the Third Circuit Court of Appeals and, therefore, at its direction and contrary to this Court's findings, this Court will enter declaratory judgment in favor of Lincoln Herbert and against the defendants on Herbert's claim of a procedural due process violation stemming from the May 5, 1994 suspension.

2. The Dean's suspension order was amply supported and justified by the pepper gas incident alone. The Dean's investigation of the incident caused him to believe that Herbert had initiated an unprovoked attack using pepper gas in the law school. When the Dean asked Herbert to explain his side of the story, Herbert set forth his self-defense argument. Dean Reinstein disbelieved Herbert's story. The Disciplinary Committee also discredited Herbert's story; in October 1994, the Committee found that Herbert had lied to the Dean when he claimed that his actions were based on self-defense. Thus, the May 5, 1994 suspension was justified even without considering the previous incidents.

3. Despite Dean Reinstein's failure to notify Herbert on May 5, 1994 that the Dean had knowledge of the previous incidents, Herbert was aware of the Dean's knowledge. At the times that other incidents occurred, Herbert actually discussed those incidents with Dean Reinstein and/or Assistant Dean Ferguson.

4. Furthermore, Herbert has not demonstrated that he would have denied his involvement in the previous incidents even if Dean Reinstein had informed Herbert that he relied in part on those incidents in determining that Herbert posed a danger to the Law School community. First, at the hearing before this Court, Herbert did not deny that the additional incidents took place as described. Second, even if Herbert had formally rebutted those charges at the May 5, 1994 meeting, Dean Reinstein and/or Assistant Dean Ferguson had already heard Herbert's version of those incidents at the time that those incidents occurred.

5. No damages proximately flowed from Dean Reinstein's May 5, 1994 failure to notify Herbert of the fact that the Dean was considering the other incidents.

6. First, Herbert himself is responsible for any damage caused to his reputation. Herbert presented no evidence showing that Dean Reinstein notified any person about the circumstances of the suspension. Rather, Herbert embarked on a campaign to publicize the suspension and the reasons underlying the suspension.

7. Second, Herbert did not offer sufficient evidence demonstrating that any distress that he suffered was caused by the May 5, 1994 due process deprivation. Rather, the distress he described resulted from his ultimate suspension in October 1994. Where a deprivation is justified but procedures are

deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure. *Carey v. Piphus*, 435 U.S. 247, 263, 98 S.Ct. 1042, 1052 (1978) ("This ambiguity in causation . . . provides additional need for requiring the plaintiff to convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself."). Here, as in *Carey*, Herbert's claim for damages fails because Herbert did not set forth any injury stemming from the procedural due process violation itself.

5. Because Herbert has not shown that he has suffered any actual damages as a result of Dean Reinstein's reliance on the previous incidents, he is entitled to receive only nominal damages. *Carey*, 435 U.S. at 266.

6. Herbert is not entitled to punitive damages. Punitive damages may be awarded only upon a showing of "reckless and callous indifference." *Smith v. Wade*, 461 U.S. 30, 56 (1983). Dean Reinstein's actions were in no way reckless or callously indifferent. In fact, the Third Circuit explicitly found to the contrary, noting that Dean Reinstein "clearly attempt[ed] to respect Herbert's rights." October 6, 1995 Opinion at 15.

7. Finally, this Court will deny Herbert's request for attorney's fees at this time. As this Court informed Herbert at the hearing, any petition for fees must be filed by his former attorney and must include legal authority to persuade this Court that Herbert is a "prevailing party" and thus is entitled to attorney's fees.

An appropriate Order follows.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 94-5765

LINCOLN HERBERT

V.

TEMPLE UNIVERSITY SCHOOL OF LAW, ROBERT REINSTEIN, DEAN, AND TEMPLE UNIVERSITY

ORDER

AND NOW, this 23rd day of February, 1996, after careful consideration of the testimony of the witnesses, the arguments of plaintiff and defense counsel, and the opinion of the Third Circuit dated October 6, 1995, it is hereby ORDERED as follows:

1. Declaratory judgment is entered IN FAVOR OF plaintiff Lincoln Herbert and AGAINST defendants to reflect the fact that the May 5, 1994 suspension of plaintiff violated his procedural due process rights.

2. Compensatory damages are awarded IN FAVOR OF plaintiff Lincoln Herbert and AGAINST defendants in the amount of one dollar ($1.00).

3. Plaintiff's request for punitive damages is DENIED.

AND IT IS SO ORDERED.

s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 30, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. *96-1291*

Herbert v. Reinstein

To: Clerk

1) Motion by Appellant for Extension of Time to File Amended Brief and Appendix.

2) Motion by Appellees to dismiss appeal.

The foregoing motions at #1 and #2 having been considered, the within appeal is hereby dismissed pursuant to the order of the Court entered May 9, 1997. The prior, non-conforming brief cannot be treated as a brief properly filed pursuant to FRAP 28(g). The Clerk specifically notes appellant's failure to conform to established briefing schedules and prior directives of the Court.

For the Court,

s/ [illegible]
Clerk

Dated: MAY 30 1997

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 3, 1997

June 20, 1997
D-132

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. *96-1291*

LINCOLN HERBERT, Appellant

v.

ROBERT J. REINSTEIN, et al.
(EDPA DC No. 94-cv-05765(CCN))

Present: GREENBERG and NYGAARD, *Circuit Judges*

1) Motion by appellant, pro se, Lincoln Herbert to set aside the Clerk's order Dismissing Appeal, which the Court may wish to construe as a motion to re-open the appeal at no. 96-1291.

s/ Lenore R. Benoit
Lenore R. Benoit 597-1092
Case Manager

Appendix E

ORDER

The foregoing motion is denied.

By the Court,

s/ [illegible]
Circuit Judge

Dated: JUL 03 1997

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AUGUST 11, 1997

July 29, 1997
E-12

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. *96-1291*

LINCOLN HERBERT, Appellant

v.

ROBERT J. REINSTEIN, et al.
(EDPA DC No. 94-cv-05765(CCN))

Present: GREENBERG, NYGAARD and ROTH, *Circuit Judges*

1) Motion by appellant, pro se, Lincoln Herbert for reconsideration of the Court's 7/3/97 order denying appellant's motion to set aside the Clerk's order Dismissing Appeal, which was construed as a motion to re-open the appeal at no. 96-1291.

s/ Lenore R. Benoit
Lenore R. Benoit 597-1092
Case Manager

See D-132 attached.

Appendix F

ORDER

The foregoing motion is denied.

By the Court,

s/ [illegible]
Circuit Judge

Dated: AUG 11 1997

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED AND FILED FEBRUARY 7, 1997 AND ENTERED FEBRUARY 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 97-0457

LINCOLN HERBERT

v.

ROBERT J. REINSTEIN, et al.

ORDER

AND NOW, this 7th day of February, 1997, in accordance with Local Civil Rule 40.1(b)(3)(A), it is hereby

ORDERED that the above-captioned case is reassigned from the calendar of the Honorable Ronald L. Buckwalter, to the calendar of the Honorable Clarence C. Newcomer as related to Civil Action No. 94-5765.

FOR THE COURT:

EDWARD N. CAHN
Chief Judge

ATTEST:

s/ Michael E. Kunz
MICHAEL E. KUNZ
Clerk of Court